

(2021) 07 DEL CK 0179

In the Delhi High Court

Case No : Civil Writ Petition No. 3605 Of 2020

Sanjay Singhal & Anr

APPELLANT

Vs

Canara Bank

RESPONDENT

Date of Decision : 27-07-2021

Acts Referred:

Constitution Of India, 1950 — Article 19(1)(g), 226
Insolvency And Bankruptcy Code, 2016 — Section 29A

Citation : (2021) 07 DEL CK 0179

Hon'ble Judges : Prateek Jalan, J

Bench : Single Bench

Advocate : Sandeep Sethi, Rishi Agarwala, Niyati Kohli, Aarushi Tikku, Pratam Vir Agarwal, Manvi Agarwal, Rakesh Gupta, Rakshit Gupta

Final Decision : Disposed Of

Judgement

Prateek Jalan, J

The proceedings in the matter have been conducted through video conferencing.

CM APPL. 2176/2021 (for condonation of delay)

This application has been filed on behalf of the petitioners seeking condonation of delay of 44 days in filing the rejoinder to the counter affidavit filed

by the respondent.

For the reasons stated in the application, it is allowed.

W.P.(C) 3605/2020 & CM APPL. 12834/2020 (for stay)

1. The petitioners have filed this petition under Article 226 of the Constitution against a notice dated 27.01.2020 issued by the respondent-Canara Bank

[the Bank], pursuant to the Master Circular on Wilful Defaulters dated 01.07.2015 [the Master Circular] issued by the Reserve Bank of

India.

2. The petitioners were directors and guarantors of loans taken by a company by the name of Bhushan Power and Steel Ltd. [â??the Companyâ?]

from the Bank.

3. By a notice dated 27.01.2020, the Bank informed the petitioners that their accounts have been identified as wilful defaulters under the Master

Circular, for the reasons stated in the said notice. The petitioners were given an opportunity to submit their representations within 15 days. The

petitioners responded to the show cause notice by a communication dated 15.02.2020, in which they answered the case on merits, and also sought

copies of the documents referred to in the show cause notice. By a further notice dated 08.06.2020, the petitioners were given an opportunity of

personal hearing before the Committee for Identification and Classification of Wilful Defaulters on 22.06.2020 [â??the Identification Committeeâ?].

4. Mr. Sandeep Sethi, learned Senior Counsel for the petitioners, submits that the impugned notices issued by the Bank are not in accordance with the

Master Circular, as interpreted by the Supreme Court in its judgment dated 08.05.2019 in State Bank of India vs. Jah Developers Private Limited and

Others (2019) 6 SCC 787. The first defect, according to Mr. Sethi, is that the show cause notice has not been issued by the Identification Committee,

but by the Branch In-Charge of the concerned branch of the Bank. His second submission is that the petitioners have not been furnished with the

documents required to make an effective representation against the notice. In this connection, Mr. Sethi submits that the show cause notice dated

27.01.2020 refers to a review conducted by M/s BDO India LLP, which has not been supplied to the petitioners.

5. Mr. Rakesh Gupta, learned counsel for the Bank, submits that the decision to issue the show cause notice was taken by the Identification

Committee itself, as would be evident from a Note dated 7.01.2020, which was submitted to the Identification Committee by the concerned officers,

and the orders of the Identification Committee recorded thereupon. He contends that the issuance of the show cause notice by an officer of the Bank,

pursuant to a decision of the Identification Committee, is not in breach of the Master Circular in any way. On the question of supply of documents,

Mr. Gupta submits that the documents sought by the petitioners, namely the

report of M/s BDO India LLP, have been supplied to the petitioners, but a copy will be furnished once again.

6. Before dealing with the aforesaid contentions of the parties, the relevant clauses of the Master Circular are reproduced below:-

3. Mechanism for identification of Wilful Defaulters

The mechanism referred to in paragraph 2.5 above should generally include the following:

(a) The evidence of wilful default on the part of the borrowing company and its promoter / whole-time director at the relevant time should be

examined by a Committee headed by an Executive Director or equivalent and consisting of two other senior officers of the rank of GM / DGM.

(b) If the Committee concludes that an event of wilful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the

promoter / whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of wilful default

and the reasons for the same. An opportunity should be given to the borrower and the promoter / whole-time director for a personal hearing if the

Committee feels such an opportunity is necessary.

(c) The Order of the Committee should be reviewed by another Committee headed by the Chairman / Chairman & Managing Director or the

Managing Director & Chief Executive Officer / CEOs and consisting, in addition, to two independent directors / non-executive directors of the bank

and the Order shall become final only after it is confirmed by the said Review Committee. However, if the Identification Committee does not pass an

Order declaring borrower as a wilful defaulter, then the Review Committee need not be set up to review such decisions.

7. The procedure given in terms of the Master Circular has been interpreted by the Supreme Court in its judgment in *Jah Developers* (supra) in the following terms:-

24. Given the above conspectus of case law, we are of the view that there is no right to be represented by a lawyer in the in-house proceedings

contained in Para 3 of the Revised Circular dated 1-7- 2015, as it is clear that the events of wilful default as mentioned in Para 2.1.3 would only relate

to the individual facts of each case. What has typically to be discovered is whether a unit has defaulted in making its payment obligations even when it

has the capacity to honour the said obligations; or that it has borrowed funds which are diverted for other purposes, or siphoned off funds so that the funds have not been utilised for the specific purpose for which the finance was made available. Whether a default is intentional, deliberate, and calculated is again a question of fact which the lender may put to the borrower in a show-cause notice to elicit the borrower's submissions on the same. However, we are of the view that Article 19(1)(g) is attracted in the facts of the present case as the moment a person is declared to be a wilful defaulter, the impact on its fundamental right to carry on business is direct and immediate. This is for the reason that no additional facilities can be granted by any bank/financial institutions, and entrepreneurs/promoters would be barred from institutional finance for five years. Banks/financial institutions can even change the management of the wilful defaulter, and a promoter/director of a wilful defaulter cannot be made promoter or director of any other borrower company. Equally, under Section 29-A of the Insolvency and Bankruptcy Code, 2016, a wilful defaulter cannot even apply to be a resolution applicant. Given these drastic consequences, it is clear that the Revised Circular, being in public interest, must be construed reasonably.

This being so, and given the fact that Para

3 of the Master Circular dated 1-7-2013 permitted the borrower to make a representation within 15 days of the preliminary decision of the First

Committee, we are of the view that first and foremost, the Committee comprising of the Executive Director and two other senior officials, being the

First Committee, after following Para 3(b) of the Revised Circular dated 1-7-2015, must give its order to the borrower as soon as it is made. The

borrower can then represent against such order within a period of 15 days to the Review Committee. Such written representation can be a full

representation on facts and law (if any). The Review Committee must then pass a reasoned order on such representation which must then be served

on the borrower. ...â??

(Emphasis supplied.)

8. Having regard to the aforesaid, it is evident that the procedure contemplated by the Master Circular involves three distinct stages. At the first stage,

the evidence of wilful default is required to be placed before a committee headed by the Executive Director or equivalent and consisting of two other

senior officers of the rank of General Manager/Deputy General Manager, often described as "the Identification Committee". Upon a conclusion

that an event of wilful default has occurred, the Identification Committee is required to issue a show cause notice to the borrower, and the promoters/

full-time directors and call for their submissions. The second stage of consideration may lead to a reasoned order by the Identification Committee

classifying the accounts of the borrower as a wilful defaulter. The concerned borrower is then given an opportunity to make a further representation,

both on facts and law. At the third stage, the order of the Identification Committee and the borrower's representation, if any, are placed before a

committee headed by the highest functionary of the bank [Chairman/ Chairman and Managing Director or the Managing Director and Chief Executive

Officer/ CEOs] and consisting, in addition, of two independent directors/ non-executive directors of the bank [usually called "the Review

Committee"]. In accordance with the decision in *Jah Developers (supra)*, the Review Committee is also required to pass a reasoned decision.

9. In the present case, it is common ground that proceedings are at the first stage, inasmuch as the notice dated 27.01.2020 is in the nature of a show

cause notice issued to the petitioners, pursuant to which their representations would be considered by the Identification Committee.

10. Mr. Gupta has placed on record the decision of the Identification Committee, pursuant to a Note submitted by the concerned department of the

Bank dated 07.01.2020. In the said Note, the case against the Company and the petitioners has been set out in detail. The Note thereafter reads as

follows:-

"In view of the above, we may be permitted to write to Circle Office / branch to issue 15 days show cause notice to all the above persons

/ entities. In case any representation is not received within the reasonable period of 15 days, we may be permitted to classify the Borrower

and its Directors/Guarantors as Wilful Defaulters once the decision of the Identification Committee is confirmed by the Review Committee

for Wilful Defaulters.

In case any representation is received, the same will be placed before the Committee for Identification and Classification of Wilful

Defaulters for taking decision with regard to providing an opportunity of personal

hearing if deemed fit.â??

11. The Note is signed by two officers of the Bank and then submitted to the members of the Identification Committee, viz. a Chief General Manager,

a General Manager and the Executive Director. It has been signed by all three officers, with the following endorsement having apparently been made

in hand by the Executive Director:-

â??Permitted to be declared as a wilful defaulter.â??

12. In these circumstances, I am unable to accept Mr. Sethiâ??s contention that the show cause notice has been issued without due authority. The

consideration at the pre-show cause notice stage will naturally be on the basis of the material submitted by the Bank to the Identification Committee.

The Note mentioned above shows that the concerned department of the Bank placed the material before the Committee and sought permission to

issue the show cause notice. This was unanimously approved by the three members of the Committee. The composition of the Committee is also

compliant with the requirements of the Clause 3(a) of the Master Circular.

13. Mr. Sethi drew my attention to the hand written note of the Executive Director of the Bank (extracted above) to submit that the Identification

Committee appears to have reached a conclusion even prior to issuance of the show cause notice. However, the noting must be read in the light of the

submission to the Identification Committee that a show cause notice was required to be issued to the petitioners. This was the purpose for which the

approval was sought and granted. Mr. Gupta also concedes that the conclusion of the Identification Committee, at this stage, is no more than a prima

facie conclusion in terms of Clause 3(a) of the Master Circular, and the matter would require independent examination after the submission of the

noticeesâ?? representation. The show cause notice has thus been issued pursuant to a conclusion recorded by the Identification Committee in terms

of paragraph 3(a) of the Master Circular.

14. The issuance of the notice by an officer of the Bank pursuant to an order of the Identification Committee is also not a breach of the Master

Circular. In the notice dated 27.01.2020 itself, reference is made to the fact that the petitionersâ?? accounts have been identified as wilful defaulters

by the Identification Committee. Once the substantive proceedings have taken place before the duly constituted committee, the issuance of the notice

is an administrative act, which could be appropriately delegated.

15. As far as the supply of documents is concerned, it is clear from the show cause notice and the response thereto that the petitioners had sought

supply of the report of M/s BDO India LLP and the underlying documents relied upon in the report. I have had occasion to consider a similar request

in *Shantanu Prakash and Another vs. Union Bank of India and Others* 2021 SCC Online Del 2436 [common judgment dated 13.05.2021 in W.P.(C)

5309/2021 and 5313/2021]. In the said judgment, it has been held as follows:-

“23. In view of the fact that the matter is being remanded to the Bank for a fresh consideration of the issue, it is not necessary to

conclusively decide this issue at this stage. Suffice it to say that the Bank is required to disclose the documents and evidence which the

Identification Committee has relied upon to arrive at the decision to issue the show cause notice. The disclosure must be such as to enable

the noticee to appreciate the scope of the allegations made against it and, if the allegations are based upon documents which the Bank

states are already in the possession of the noticee, such as its own accounts, to identify the transactions upon which the Bank seeks to rely.

24. The fundamental principle, as laid down by the Supreme Court in *Natwar Singh v. Director of Enforcement* (2010) 13 SCC 255

(paragraph 30) is that “nothing should be used against the person which has not been brought to his notice”. In paragraph 26 of the

said judgment, the Court also reiterated the flexible approach to be adopted while considering claims of violation of natural justice. Upon a

consideration of the applicable statutory and regulatory scheme, the Court held that the petitioner therein was entitled to the documents

relied upon by the authority, but not to other documents in its possession.

25. In the facts of the present case Mr. Gaggar may be correct in submitting that the Bank will not be required to supply copies of the

Company's own accounts to the Company itself. However, at the very least, the transactions based upon which the Bank has arrived at its

conclusion must be identifiable from the disclosure. Mr. Krishnan points out that the petitioners in the present case are not the Company

itself, which is under the control of a resolution professional, but its erstwhile directors - one who claims to have resigned in 2014 and the

other who was a director until the Company went under the resolution process.

26. Mr. Gaggar's submission regarding the distinction between an administrative decision and a quasi-judicial/judicial decision does not

persuade me to a contrary conclusion. It is now well settled that the principles of natural justice are applicable to administrative decisions

as well. Reference may be made, for this purpose, inter alia to the decisions of the Supreme Court in *Canara Bank v. Debasis Das* (2003) 4

SCC 557 (paragraph 19) and *Manohar v. State of Maharashtra* (2012) 13 SCC 14 (paragraph 17). The determination rests not upon such

a classification of the decision, but upon the entire statutory scheme, the nature of the inquiry and other relevant factors, as indicated, by

way of example, in paragraph 26 of *Natwar Singh* (supra).

27. As the proceedings are being remanded to the Bank, it is for the Bank to take a call as to the extent of disclosure required in law, if any,

bearing the aforesaid observations in mind. The rights and contentions of the parties in this regard are reserved.â??

16. In the present case also, at this stage, it is for the Bank to identify the documents required to be supplied to the petitioners in order for them to

identify with sufficient precision the transactions upon which the Bankâ??s allegations are based. The noticees should have the material upon which

they can make an effective submission for consideration of the Committees.

17. At Mr. Guptaâ??s request, the Bank is granted a further period of two weeks to consider whether any additional documents are required to be

supplied to the petitioners. Mr. Gupta also states that the petitioners will be given a period of 15 days thereafter to make comprehensive

representations before the Identification Committee. The Identification Committee will then fix a personal hearing and proceed in accordance with

law.

18. Needless to say, in the event the Identification Committee reaches a conclusion adverse to the petitioners, a reasoned order will be supplied to the

petitioners in terms of *Jah Developers* (supra), and they will be given 15 daysâ?? time to make a representation to the Review Committee.

19. In the event the Review Committee also confirms the decision of the Identification Committee, the respondent-Bank is directed not to publish the

names, photographs or other particulars of the petitioners for a period of one

week until after the communication of the order to the petitioners, so that they can seek legal redress, if so advised.

20. The writ petition, alongwith pending application, is disposed of with the above directions.